

March 20, 2007

Mr. Michael O’Gara  
Town Manager  
Town of Greenwood  
100 West Market Street  
P.O. Box 216  
Greenwood, DE 19950

Re:    **Freedom of Information Act Complaint  
      Against Town of Bridgeville**

Dear Mr. O’Gara:

Our Office received your complaint on January 10, 2007 alleging that the Town of Bridgeville ("the Town") violated the public record requirements of the Freedom of Information Act, 29 *Del. C. Ch. 100* ("FOIA").

You enclosed with your complaint a copy of a letter dated November 13, 2006 you sent to Ms. Bonnie Walls, the Bridgeville Town Manager, requesting:

1.     Audited financial statements from 2002 to present including, but not limited to schedules and statements related to sewer operations and any accountants’ related financial statement notes or comments related to sewer operations or capital expenditures;
2.     Debt or grant agreements related to the sewer system from 2002 to the present;

3. Contracts related to sewer construction and the leasing or acquisition of lands for spray irrigation;
4. Bid or bid award documents related to sewer construction;
5. Engineering Feasibility Study related to sewer expansion, specifically any additions, alterations, or extensions for expanding sewer treatment capacity;
6. Existing sewer budget support documents or working papers;
7. Bank statement copies, transaction reports, other reports, and any other related documents regarding the sewer "sinking fund";
8. Engineer estimates of engineering fees related to the sewer expansion project;
9. Sewer Plant Flow Reports;
10. All documents, notes, memos, e-mails, papers, or reports used to develop quarterly billings to the Town of Greenwood for sewer service;
11. Monthly Internal Revenue and Expenditure Reports;
12. Minutes and documents related to significant decisions detrimental to Greenwood’s interest.

According to your complaint, "[m]ore than twenty (20) business days have passed since the letter sent to the Town of Bridgeville was signed for" and the Town still has not provided you access to the records you requested.

By letter dated January 11, 2007, we asked the Town to respond to your complaint by January 22, 2007. By letter dated January 30, 2007, Ms. Walls responded stating that she had referred your FOIA complaint to the Town Solicitor. Ms. Walls enclosed a copy of a letter from Joseph T. Conaway, the Town Commission President, advising you that the Town "is legally entitled to charge the requestor reasonable and customary charges to obtain" the information you requested under

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FOIA. The Town estimated it would take the time of three employees, at an average hourly rate of \$113.83 per hour, "at least 100 hours to compile this information." Mr. Conaway asked you to "please forward a check for \$11,383 to cover the beginning costs of your request. When we have received that check we will begin the process. Obviously, if we have to spend more time than anticipated, you will be expected to add to your first payment. Besides the hourly rates and the Engineering requests, you will be expected to pay for any costs that we incur to compile the data. This includes copying, secretary time, telephone costs and any other costs that are associated with this production."

Our Office received the Town's response to your FOIA complaint by facsimile on February 6, 2007. The Town contends that: (1) your FOIA request is "excessively broad and, in the case of request numbered 12, subjective"; (2) "the documents requested may not be in the Town's possession, custody, or control, but may be in the possession of the Town's engineer, attorney, bankers, lenders, vendors and others"; and (3) the records you requested are exempt from disclosure under FOIA because they "are in anticipation of a contract dispute or litigation."

On February 16, 2007, our Office asked the Town for a copy of its written FOIA policy with a schedule of costs for copying records. On March 1, 2007, the Town Solicitor advised us that the Town does not have a written FOIA policy.

#### **RELEVANT STATUTES**

FOIA provides that "[a]ll public records shall be open to inspection and copying by any

citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA exempts from disclosure "[a]ny records pertaining to pending or potential litigation which are not the records of any court." 29 *Del. C.* §10002(g)(9).

FOIA provides that "[a]ny reasonable expense involved in the copying of [public] records shall be levied as a charge on the citizen requesting such copy." *Id.* §10003(a). "It shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records." *Id.* §10003(b).

## **LEGAL ANALYSIS**

### **A. Overbreadth**

FOIA does not require a public body to honor "[b]road, sweeping requests lacking specificity." *Att’y Gen. Op.* 94-IO30 (Oct. 19, 1994). "It is the duty of the requestor to frame the request with sufficient specificity so that it is not unnecessarily broad." *Id.* See *Att’y Gen. Op.* 95-IB24 (Aug. 7, 1995) ("Since the description of the documents sought was not sufficient to allow the City to locate such records, the request lacks specificity"); *Att’y Gen. Op.* 02-IB10 (Apr. 24, 2002) ("your request regarding indirect administrative costs is not specific enough under FOIA").

A public body, however, cannot deny a broad FOIA request just because of the "administrative burden on a small staff." *Att’y Gen. Op.* 96-IB13 (May 6, 1996). Administrative burden, by itself, "is not a valid reason, under FOIA, for not producing all of the public records

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requested." *Att’y Gen. Op.* 97-IB06 (Mar. 17, 1997). A requestor has "to frame the request with sufficient specificity" so that the public body knows what the requestor wants and where to locate it. *Id.* Whether a request sufficiently describes the public records sought so that they can be located with reasonable effort is a distinct issue from whether there might be an administrative burden involved.

With the exception of two categories of records requested in your letter of November 13, 2006, we believe that your FOIA requests are reasonably specific for the Town to locate those records and make them available for inspection and copying. We do not believe that Items 10 and 12 are reasonably specific. Item 10 ("All documents, notes, memos, e-mails, papers, or reports used to develop quarterly billings to the Town of Greenwood for sewer service") and Item 12 ("Minutes and documents related to significant decisions detrimental to Greenwood’s interest") would require the Town to search vast numbers of public records and make subjective decisions whether a particular public record was "used to develop" sewer bills or "related to significant decisions detrimental to Greenwood’s interest."

We determine that the other records you requested under FOIA from the Town are reasonably specific. The Town must make them available for inspection and copying unless: (1) the Town is not the appropriate custodian of those records for purposes of FOIA; or (2) the records fall under one of FOIA’s exemptions from disclosure.

B. Custodian

FOIA provides that a FOIA request should be made to the "appropriate custodian" of the records sought. 29 *Del. C.* §10003(a). The Town contends it is not the custodian of some of the

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records you requested because they "may be in the possession of the Town’s engineer, attorney, bankers, lenders, vendors and others."

Our Office has determined that FOIA may require a public body to produce records that are in the possession of a third-party in a contractual relationship with the public body. In *Att’y Gen. Op.* 06-IB17 (Aug. 21, 2006), the Public Integrity Commission engaged a private company to compile and maintain an electronic database. Our Office determined that the Commission was the "constructive custodian" of the data for purposes of FOIA because the Commission "owns the database and has a complete right of access to the data. . . . The Commission is the custodian of the database for purposes of FOIA because it contains information ‘owned,’ ‘used,’ or ‘otherwise compiled and collected’ by the Commission" (quoting 29 *Del. C.* §10002(g)).

In *Swaney v. Tilford*, 898 S.W.2d 462, 464 (Ark. 1995), the Arkansas Supreme Court held that the Arkansas Development Finance Authority had "constructive possession and administrative control over" the working papers of its auditors, Deloitte Touche. "[FOIA] mandates that the burden be placed on the appropriate state agency to make arrangements for reasonable access to the records in . . . the office of the private custodian." *Id.* at 465. *See also Tober v. Sanchez*, 417 So.2d 1053 (Fla. App. 1982) (county accident reports in the possession of the county’s private attorney were public records under FOIA).

We believe that the courts in Delaware would agree that when a public body has constructive possession or administrative control of records in the possession of an accountant or attorney or other private agent, those records are public records for purposes of FOIA and the public body must arrange to make those records available for inspection and copying upon request.

Under FOIA, the Town has the burden of proving that it does not have constructive possession or administrative control over records in the possession of third party agents like attorneys and accountants. "‘This allocation of the burden of proof underscores the basic public policy that . . . the plaintiff asserting a freedom of information claim has a disadvantage because only the public body holding the information can speak confidently regarding the nature of the material and the circumstances of the preparation and use . . . ’" *Att’y Gen. Op.* 05-IB10 (Apr. 11, 2005) (quoting *Guy v. Judicial Nominating Commission*, 659 A.2d 777, 781 (Del. Super. 1995) (Ridgely, Pres. J.)).

We determine that the Town has not met its burden under FOIA to show that it is not the constructive custodian of the records you requested which may be in the possession of private parties like an accountant or attorney.

C. Potential Litigation Exemption

"The ‘potential litigation’ exemption under FOIA requires a two-prong analysis: first, litigation must be likely or reasonably foreseeable; and second, there must be a clear nexus between the documents requested under FOIA and the subject matter of the litigation." *Att’y Gen. Op.* 02-IB30 (Dec. 2, 2002). "In our litigious society, a government agency always faces some threat of suit. To construe the term ‘potential litigation’ to include an unrealized or idle threat of litigation would seriously undermine the purpose of FOIA." *Att’y Gen. Op.* 02-IB12 (May 21, 2002). "The potential litigation exception applies only when there is a realistic and tangible threat of litigation based on objective factors such as a written demand letter or notice of intent to sue." *Id. See Att’y Gen. Op.* 06-ID06 (Feb. 22, 2006) ("In light of the parties’ litigation history and [the former employee’s]

representation by counsel, there are sufficient objective factors that might warrant application of FOIA’s potential litigation exemption”).

The Town has not met its burden under FOIA of proving that any of the records you requested pertain to potential litigation. There is no evidence in the record of any objective factors pointing to a realistic and tangible threat of litigation by the Town of Greenwood against the Town of Bridgeville. We determine that the records you requested from the Town are not exempt under FOIA as pertaining to potential litigation.

D. Reasonable Expenses

"FOIA allows a public body to charge a reasonable expense involved in the copying of public records." *Att’y Gen. Op.* 05-IB06 (Mar. 9, 2005). However, "FOIA places an affirmative duty on a public body ‘to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.’" *Att’y Gen. Op.* 04-IB08 (Mar. 9, 2004) (quoting 29 *Del. C.* §10003(b)). "The purpose of requiring a rule or regulation is to make it easy for a citizen to know in advance how much it will cost to have public records copied and to ensure uniform treatment. Accordingly, our ‘Office has previously determined that where a public body has not promulgated a rule or regulation, it can charge only the actual cost of copying with no administrative surcharge." *Att’y Gen. Op.* 04-IB08 (quoting *Att’y Gen. Op.* 99-IB08 (June 9, 1999) (citing *Att’y Gen. Op.* 95-IB08 (Feb. 6, 1995))).

The Town acknowledges it does not have a written FOIA policy establishing uniform charges for copying public records. Accordingly, the Town can charge only the actual cost of duplicating those records. If the records are in hard-copy, the Town can charge only the fixed costs of



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photocopying (paper and copy machine). Under FOIA, the Town cannot charge you for any labor involved in retrieving the records you requested or to supervise your inspection of those records. The Town also cannot charge you for the variable cost of labor to duplicate those records. The Town cannot charge you up front to copy any records until you first have had the opportunity to inspect the records and designate which records you would like copied in order to minimize your cost.

We understand that the Town may be in the process of adopting a written FOIA policy to establish a fee schedule for copying public records. If so, the new policy would not apply to your FOIA request because it pre-dates that policy. Under FOIA, the relevant date is the date of the request, not the date when the records are made available for inspection and copying.

In *Att’y Gen. Op. 99-IB08* (June 9, 1999), a citizen made FOIA requests to the school district for public records on March 2 and 16, 1999. By letter dated April 15, 1999, the School District responded that it was developing a written policy to charge for the costs of employee time before it would process the citizen’s request. The School District adopted its new FOIA cost policy on April 28, 1999. Our Office determined that "the School District must make all public records that [the citizen] requested prior to April 28, 1999 available to you for inspection and copying without charge except for the direct photocopy costs."

We determine that the Town violated FOIA when it conditioned your access to public records on paying \$11,383 to cover the initial labor costs for processing your FOIA request. Because the Town did not have a written FOIA policy in place at the time of your request, the Town cannot charge you more than the actual fixed cost of duplicating the records requested.

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**CONCLUSION**

For the foregoing reasons, we determine that the Town violated the public records requirements of FOIA by conditioning your access to public records on the payment of \$11,383 in initial labor costs to retrieve and compile the records because the Town did not have a written, uniform FOIA cost schedule as of the date you made your request.

As remediation, we direct the Town to make the records you requested available for inspection at no cost within thirty days of the date of this letter, except for Items 10 and 12 of your request. After you have had the opportunity to inspect those records, you can designate which records you would like copied. The Town may charge you only the actual fixed costs of photocopying.

We direct the Town Solicitor to report back to our Office in writing within ten days after the Town completes remediation.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED:

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Lawrence W. Lewis, Esquire  
State Solicitor

cc: The Honorable Joseph R. Biden, III  
Attorney General

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